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Administrator in the Condominium Act

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The Condominium Act introduces an innovative method of administration in the buildings defined as condominiums by the same Act. This Act introduces the appointment of an administrator for the common parts of the condominium. The nature of the administrator has been discussed by several authors and they have proposed various theories in this regard.

Salis opines that the administrator is *un mandatario dei proprietari dell'edificio e conserva tale qualità anche quando la sua nomina viene fatta dall'autorità giudiziaria su istanza di qualcuno dei proprietari, avendo l'assemblea omesso di deliberare al riguardo.*¹

The Appointment of the Administrator

Section 15 provides that

when there are more than three condominiums, the meeting of the condominiums shall appoint an administrator.

This section demands that in the cases when the condominium is made up of four condominiums or more, then the condominiums must appoint an administrator at the meeting of the condominiums. The provision in section 15(1) is not of a facultative nature for it is using the word 'shall' and not 'may' as in the case of regulations in section 24.

The law here uses the phrase 'more than three condominiums'. This is to be interpreted that there must be more than three units rather than more than three condominiums. The reason is that there may be a condominium made up of three units and one unit is co-owned by more than one condominium, and thus both of them would be condominiums. Yet the legislator, when drafting the section, had in mind a situation whereby there is one condominium per unit.

In the cases when the condominium is made up of less than four units, then the administration of the condominium will be held jointly, even though the condominiums in such a case may opt to appoint an administrator. Whereas in the case of a condominium made up of more than three units the ap-

pointment of the administrator is compulsory, in other cases, namely condominiums having three or less units, the appointment of the administrator is of a facultative nature.²

In the case that the condominiums do not agree on the appointment of the administrator then the law provides for the referral of the matter to arbitration. Such a referral should be made either by one more condominium and the arbitrator will appoint the administrator himself. Thus the law is providing for another situation wherein the arbitrator will substitute the will of the meeting of the condominiums.³

Once the condominiums appoint the administrator, the administrator must inform the Land Registrar of his appointment within fifteen days from the date of the appointment. The law also provides that any condominium may inform the Land Registrar of such appointment of the administrator.⁴

The administrator is considered as the mandatory of the condominium, that is the person who executes the will of the condominium as expressed in a decision of the meeting. It is questionable whether he must accept the appointment in order that this form of mandate can come into effect in the same way as in the case of mandate in the Civil Code.⁵

Salis notes that the law does not require that the person nominated as administrator formally accepts the appointment.⁶ The fact that the administrator commences to execute the duties of administrator, is a tacit manner of showing his acceptance. In the case that he does not accept, he is duty bound to inform the condominiums in order to convene another meeting so that another administrator can be appointed. Until that day however, the person appointed, notwithstanding his lack of acceptance, will still be deemed to be the administrator of the condominium.

Who may be Appointed as Administrator?

The law does not lay down any limitations with regards to who may be appointed as an administrator. It seems that since

¹ Salis, L., *Il Condominio negli Edifici*, (1956) p. 251.

² Corte di Cassazione 03.01.1966, n. 24.

³ Section 15(1) Condominium Act.

⁴ Section 15(6) and 15(7) Condominium Act.

⁵ Section 1856(2) Chapter 16 of the Laws of Malta 'The contract is not perfected until the mandatory has accepted the mandate'.

the administrator is to be considered as a mandatory of the owners then the limitations with regards to mandate in the Civil Code should apply.⁷

The administrator may be a condominus or else a person who is a third party to the condominium. For example, the condomini may appoint an accountant or an advocate or a person who presents himself to render the services of an administrator. The condomini may also appoint a company to act as administrator.⁸ In Italy, a considerable number of companies have been formed in order to render the services of administration in condominia. At first there was a dispute whether the administrator could be a moral person other than a physical person. Case law⁹ and commentaries by various authors however, have resolved the matter.

The Tribunal of Milan has noted that the law does not put forward any incompatibility.¹⁰ Thus, the only means possible to create an incompatibility is by having a regulation that controls the appointment of the administrator by the condomini.

One notes that there cannot be a contract binding the condomini that the administration of the condominium or the appointment of the administrator is limited to one or some of the condomini.¹¹ Such an agreement would be null and void. Furthermore, under Maltese law it would be considered as contrary to law since the provisions of section 15 are considered by section 3 of the Act to be public policy provisions.

The Functions of the Administrator

Section 16 lays down the functions of the administrator, yet the list given in this section is not an exhaustive one since it provides that 'the functions of the administrator shall include'. The reason being that there are various duties of the administrator which were already discussed in relation to the convocation and conduction of the meetings of the condomini.

Salis¹² notes that the functions of the administrator may be considered to be the contents of the contract of mandate that arises between the condomini and the administrator once the administrator is appointed by the meeting of the condomini. Thus, the appointment of the administrator is a mandate with a number of duties specifically identified by the law.

The functions listed are:

1. to execute the decisions of the meeting of the condomini and to ensure the observance of the rules regulating the condominium.¹³ It has been held that since the administrator is a mandatory of the condomini, he is to execute all the decisions with the diligence of a *bonus pater familias*.¹⁴

The diligence of the administrator changes in accordance to whether the duties will be carried out gratuitously or for a remuneration. The Civil Code¹⁵ and Maltese case law¹⁶ have pointed out that in the case when the mandate is carried out for a fee, the level of diligence increases to that of *culpa levis in abstracto*.

The administrator must always carry out the decisions of the meeting so long as they are not against the law, such as in the case of introducing an innovation without the necessary development permits.¹⁷

De Tilla opines that:

*L'obbligo dell'amministratore di curare l'osservanza del regolamento di condominio si riferisce non solo alle parti dell'edificio comuni a tutti i partecipanti e, come tali, inscussibili di proprietà separate, ma riguarda anche la vigilanza sulla regolarità dei servizi comuni, anche per quanto attiene alle interferenze con i singoli appartamenti. Riguarda, altresì, sia il potere di eseguire verifiche e di impartire le necessarie provvidenze intese a mantenere integra la parità del godimento dei beni comuni da parte di tutti i condomini, sia il contrasto dell'uso delle parti esclusive con le regole fissate nel regolamento. Non riguarda, in fine, i rapporti personali tra i condomini.*¹⁸

⁶ Salis, L. 'Condominio: nomina dell'amministratore e accettazione', *Rivista Giuridica dell'Edilizia*, 1986. I. 545.

⁷ Section 1869 et Seq. Chapter 16 of the Laws of Malta.

⁸ Murra, R. 'Sulla nomina di una società commerciale ad amministrare di un condominio', *Giustizia Civile*, 1989. I. 2486.

⁹ Tribunale di Roma 31.05.1989, c. Condominio Faloria II.

¹⁰ Tribunale di Milano 27.01.1977.

¹¹ Cass. 19.10.1961, n. 226.

¹² Salis, L., op. cit. *Rivista Giuridica dell'Edilizia*, 1986. I. 545.

¹³ Section 16(1)(a) Condominium Act.

¹⁴ Cass. 08.10.1963, n. 2668.

¹⁵ Section 1874 Chapter 16 of the Laws of Malta: '(1)A mandatory is answerable not only for fraud, but also for negligence in carrying out the mandate. (2) Nevertheless, such liability in respect of negligence is enforced less rigorously against a person whose mandate is gratuitous than against one receiving a remuneration.

¹⁶ *Borg noe v. Calascione*, Qorti Tal-Kummerç 25.05.1961, Vol. XLV-III-814.

¹⁷ De Tilla, M., 'Attribuzioni e Rappresentanza dell'Amministratore del Condominio', *Giustizia Civile*, 1994. II. 133.

¹⁸ De Tilla, M., 'La legittimazione dell'amministratore di condominio per l'osservanza del regolamento e la validità ed opponibilità delle clausole che limitano l'uso delle parti di proprietà esclusiva', *Giustizia Civile*, 1989. I. 1370.

2. to regulate the use of the common parts and the performance of services in the common interest, in such a way that all the condomini are assured the maximum benefit possible.¹⁹ It has been held by the Court of Cassation²⁰ that in the case when a common part is used in turn by the condomini, the administrator may hold the keys of such an area in order to assure that all the condomini would have the chance of making use of it.
3. to apportion the costs in terms of subsection 11(1).²¹ Section 11(1) reads that the expenses are to be divided according to a valuation of each separate unit within the condominium, unless otherwise agreed. This excludes the apportionment in the case of a common part or service that serves the condomini in an unequal measure as provided for in section 11(2) of the Condominium Act. Thus, an amendment is necessary in order that a reference can be made to subsection (2) of section 11.
4. to collect the contributions from the condomini.²² Once the condomini at the meeting agree on the estimates for expenditure on maintenance, the administrator may apportion the expenses and proceed with the collection of the funds due. The amount becomes due as from the date of the decision of the meeting even though the apportionment is not yet carried out.²³ The administrator, does not need a new approval of the meeting in order to institute legal action if a condominus does not pay his share.²⁴
5. subject to the approval of the meeting, to set up and maintain a floating fund to which the condomini shall contribute their share.²⁵
6. to perform such acts as are necessary for the preservation and protection of the common parts.²⁶ This paragraph is not to be interpreted in a restrictive manner, that is, the administrator's power is limited to the carrying out acts of maintenance of the common parts and services. The Italian courts have interpreted the paragraph to include the duty of the administrator to file possessory actions in the case that any of the common parts are invaded by third parties or a condominus.²⁷
7. in the case that a condominus, or a third party to the condominium, carry out works that affect the enjoyment of the condominium by the condomini, then the administrator may file an action in order that those works are stopped or removed.²⁸
8. to render accounts to the condomini at such intervals as the meeting shall decide or as may be established in the rules regulating the condominium.²⁹ Since the administrator is a mandatory, it is natural that he would be duty-bound to render accounts to the condomini at specific intervals. The Court of Cassation held that the rendering of accounts need not be in a strict manner as would be necessary in the case of a limited liability company.³⁰ They must be made in a manner that the condomini may understand what funds the administrator spent and received.
9. to claim or receive monies or interest³¹
10. to take necessary steps to have in force an adequate insurance of the condominium when the condomini so agree.³² Prior to the recent amendments, this section read that the administrator was to take the necessary steps to insure the block. This section, prior to the amendments, charged the administrator with the duty to insure the building, yet the law now charges the administrator with such a duty only if the condomini agree about such an insurance.

Under Italian law, this function of the administrator is not specifically identified. In fact, authors disagree whether the administrator may enter into a contract of insurance on behalf of the condominium without a particular decision to that effect. The Tribunale di Roma has held that the administrator may insure the condominium without a decision of the meeting of the condomini since the insurance contract is a means of preserving the condominium.³³

¹⁹ Section 16(1)(b) Condominium Act.

²⁰ Cass. 23.07.1983, n. 5076.

²¹ Section 16(1)(c) Condominium Act.

²² Section 16(1)(c) Condominium Act.

²³ Cass. 29.10.1975, n. 3655.

²⁴ Cass. 11.11.1992, n. 12125.

²⁵ Section 16(1)(c) Condominium Act.

²⁶ Section 16(1)(d) Condominium Act.

²⁷ Cass. 11.11.1986, n. 6593.

²⁸ Cass. 08.03.1986, n. 1552.

²⁹ Section 16(1)(e) Condominium Act.

³⁰ Cass. 25.07.1977, n. 3309.

³¹ Section 16(1)(f) Condominium Act.

³² Section 14(5) Condominium Act.

³³ Tribunale di Roma, 11.08.1988.

11. to perform such other acts which are ancillary or conducive to the proper management of the condominium.³⁴ This provision may give rise to a wide interpretation and thus increase considerably the powers and duties of the administrator. It may also be considered to give discretion to the administrator, for he can decide what is ancillary or conducive to the proper management and what is not.
12. the administrator is also the person who will take care of the records of the meeting of the condomini. He is to keep a register of the addresses of the condomini, the minutes of the meetings, a register recording the notices sent to the condomini and a copy of all the notices, decisions as well as directives.³⁵

Representation by the Administrator

The administrator, in all matters relating to the common parts of the condominium, represents all the condomini and may sue third parties to the condominium or the condomini themselves. On the other hand, he may also be sued by the third parties or the condomini in relation to the common parts of the condominium.³⁶

The Court of Cassation has held that

*La rappresentanza in giudizio del condominio spetta inderogabilmente a norma dell'articolo 1131, all'amministratore nominato all'assemblea dei condomini, nei limiti delle attribuzioni indicate dalla legge o dei maggiori poteri conferitigli dal regolamento o dall'assemblea, restando in facoltà del singolo condomino di intervenire nella lite solo ad adiuvandum come portatore di un interesse proprio.*³⁷

The representation of the condominium and the condomini by the administrator is limited by the provisions of section 16. In the case that the administrator files an action that is beyond his duties as listed by the law, then he would need a decision of the meeting of the condomini in order to file the action or to represent the condomini in an action filed against him.³⁸

The administrator, in the case of a law-suit relating to the common parts, may be sued on behalf of the condomini.³⁹

Thus, in the case that a contractor or a servicing company carries out works in the common parts such as maintenance or redecoration and the company does not receive payment, the action for the payment of the works would be filed against the administrator and not against all the condomini as in the case of property that is held in co-ownership. In the case of a judgement that is passed against the administrator, the judgement is enforceable against all the condomini unless the matter concerned a number of condomini.⁴⁰

The law also provides that any lawful order issued by any authority concerning the common parts, shall be addressed to the administrator.⁴¹ If the condomini decide to carry out an innovation, and the innovation is not carried out with the necessary development permits, then the order by the competent authority would be addressed to the administrator and not the individual condomini. Thus, for all intents and purposes of the law, in such cases, the administrator would be responsible for such breaches of the law even if the works were not executed by him.

In the case that the administrator is served with a writ of summons or a judicial act that goes beyond his functions, then he must inform the condomini immediately and convene a meeting to discuss the matter.⁴² In the case that the administrator fails to carry out such a duty he would be responsible in damages.⁴³

The necessity of convening a meeting in this case, unlike the other cases, is that the condominus cannot defend an action that goes beyond his powers. In this case, the action would fall outside the scope of his mandate and thus if the mandatory were to defend the action he would be acting ultra vires.

Review of the Administrator's Decisions

The law states that the measures that are taken by the administrator within the limits of his functions are binding on all the condomini.⁴⁴ The law further provides that a condominus may appeal against a measure taken by the administrator to the meeting of the condomini. The condominus may also refer the matter to arbitration.

³⁴ Section 16(1)(h) Condominium Act.

³⁵ Section 16(2) Condominium Act.

³⁶ Section 17(1) Condominium Act.

³⁷ Cass. 08.08.1989, n. 3646.

³⁸ Cass. 11.11.1992, n. 12125.

³⁹ Section 17(2) Condominium Act.

⁴⁰ Salis, L., 'Condanna nelle spese di lite ed obbligo dei condomini interessati.' *Rivista Giuridica dell'Edilizia*, 1965. I. 716.

⁴¹ *ibid.*

⁴² Section 17(3) Condominium Act.

⁴³ Section 17(4) Condominium Act.

⁴⁴ Section 19 Condominium Act.

The Court of Cassation has held that in the case when the administrator acts beyond his powers, the condominus may either appeal to the meeting or else he may file an application to the judicial authority.⁴⁵ The condominus need not appeal to the meeting first and then file the application. The application may be filed without the deliberation of the meeting.

The Rights of the Administrator

The administrator has a right to be reimbursed with the monies spent by him in the course of his administration and furthermore, if the condomini so decide, he is entitled to a fee. Since the administrator is a mandatory of the condomini, the mandator must repay to the mandatory the advances and expenses made or incurred by him in the carrying out of the mandate.⁴⁶

The Court of Cassation has upheld this reasoning and held that the administrator has a right to interest as from the date he made the disbursements, in the case that he has to pay funds on behalf of the condominium which have not been collected from the condomini.⁴⁷

The law provides that

the fees due to the administrator shall be determined by the meeting of the condomini.⁴⁸

Furthermore, the law notes that one of the functions of the meeting is

to determine any remuneration that may be due.⁴⁹

It seems that the post of administrator is not necessarily an onerous one and there is the possibility that, like the case of mandate, the post may be held gratuitously. In fact, the law uses the words, 'any remuneration that may be due'.

The Court of Cassation has held that the decision whether the post of administrator is of a gratuitous nature or not depends on the regulations of the condominium, in their absence, the deliberations of the meeting of the condomini.⁵⁰ If the regulations provide for the appointment and reimbursement of the administrator, the appointment would be considered as an act of ordinary administration of the condominium and thus the notice of meeting need not indicate that the meeting will decide on the appointment of the administrator.⁵¹

The remuneration and its extent depends on various factors, namely:

1. the extent of the administrator's duties;
2. size of the condominium;
3. whether the administrator is a condominus or not;
4. whether he or she is a professional administrator.

Terzago opines that the compensation must be calculated in accordance to article 1709 of the Italian Civil Code which states that:

*Il mandato si presume oneroso. La misura del compenso, se non è stabilita dalle parti, è determinata in base alle tariffe professionali o agli usi; in mancanza è determinata dal giudice.*⁵²

The Court of Cassation has held that when the judge is deciding on the *quantum* of compensation, he must be guided by the following principles:⁵³

1. the extent of the service which was rendered;
2. the sum must be proportional to the services which were rendered; and
3. reference must be made to the current rates which are paid for such services.

Under Maltese law, unlike Italian law, mandate is presumed to be gratuitous. Thus, if the parties do not agree upon a form of remuneration, the mandate would be deemed to be gratuitous. Since administrator is considered as a mandatory, it is important that the meeting indicates clearly that the administrator will be paid. If no agreement is entered into between the administrator and the condomini on the remuneration and if the regulations of the condominium do not provide for such remuneration, then the administrator may not file a claim against the condomini for payment.

Termination of Appointment

Once the administrator is appointed, he will continue in office for a period of two years and his appointment is terminated on the date that another administrator is appointed.⁵⁴ Accordino opines that if another administrator is not nominated after the passage of the two year period, that may be considered as a tacit acceptance of the existing administrator.⁵⁵ The tacit confirmation does not occur in the case when the administrator is suspended from his duties.

⁴⁵ Cass. 08.03.1977, n. 960.

⁴⁶ Section 1881 Chapter 16 of the Laws of Malta.

⁴⁷ Cass. 24.03.1981 n. 1720.

⁴⁸ Section 15(9) Condominium Act.

⁴⁹ Section 21(a) Condominium Act.

⁵⁰ Cass. 09.01.1967, n. 89.

⁵¹ Cass. 12.01.1978, n. 124.

⁵² Terzago, G., *Il Condominio*, (1998) p. 435.

⁵³ Cass. 13.02.1970, n. 352.

⁵⁴ Section 15(2) Condominium Act.

⁵⁵ Accordino, G., *Brevi Note in Materia di Nomina e Conferma dell' Amministratore di Condominio* Archivio di Locazione e Condomino 186. I. 165.

The administrator may opt to resign from his office prior to the passage of the term of two years. In such a case, the administrator must convoke a meeting in order to discuss his resignation and the appointment of another administrator. If the condomini do not decide on the matter at the meeting, the administrator may refer the matter to arbitration and in that case, the administrator will be appointed by the arbitrator.

The condomini may decide to remove the administrator by means of a decision of the meeting that is approved by two-thirds of the condomini who are present at a validly constituted meeting.⁵⁶ The removal of the administrator may also occur by referring the matter to arbitration in the cases when he does not render his accounts or there is a serious suspicion that the administrator has acted irregularly or in the case that the administrator fails to perform his duties.⁵⁷

The law provides that, on termination, the administrator must return the registers to the new administrator.⁵⁸ Borselli notes that the administrator, on termination of his appointment, must return the documents to the condomini or to the new administrator himself and he cannot ask the condomini to collect the documents from him.⁵⁹ Furthermore, if the dismissed administrator does not return the documents within a reasonable time, he would be liable to damages.

The administrator shall inform the Land Registrar of such termination of his appointment within fifteen days.⁶⁰ Any condominium may inform the Land Registrar about such termination in the case that the dismissed administrator fails to do so.⁶¹

⁵⁶ Section 21(7)(a) Condominium Act.

⁵⁷ Section 15(4) Condominium Act.

⁵⁸ Section 16(3) Condominium Act.

⁵⁹ Borselli, E., *Amministratori di condominio indesiderabili*, Nuova Rassegna, 1974 p. 1279.

⁶⁰ Section 15(6) Condominium Act.

⁶¹ Section 15(7) Condominium Act.